IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 5TH OCTOBER 2007 / 13TH ASWINA 1929

CRL.A.No. 880 of 2004()

SC.7/2000 of ADDL. SESSIONS COURT (ADHOC)-II, ALAPPUZHA
CP.5/1999 of JUDL.MAGISTRATE OF FIRST CLASS-I, CHENGANNUR
.....

APPELLANT:

RAJAN S/O. KUMARAN,
CONVICT NO.8170, CENTRAL PRISION,
THIRUVANANTHAPURAM.

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

CRL.APPEAL.NO.880 OF 2004 (B)

Dated this the 5th day of October, 2007

J U D G M E N T

KOSHY,J.

The sole accused in S.C.No.7/2000 on the file of the Additional Sessions Court, Fast Track (ADHOC - II), Alappuzha is the appellant herein. He was convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced for life imprisonment on the allegation that he murdered one Kunjukunju aged 70 years, who was none other than his own uncle (mother's brother). The charges issued by the Sessions Court is as follows:

> "That you the accused on 28.6.1998 at 2.15 p.m. stuck a blow with a chopper and caused injury on the back and ribs of the victim Kunjukunju with intention and knowledge that his act will cause the death of Kunjukunju and he succumbed to his injuries on 10.7.1998 at 1.15 at the hospital and committed murder of said Kunjukunju for offence under Section 302 IPC within the cognizance of this Court."

Police started investigation after registering Ext.P7 F.I.R for the

offence punishable under Section 324 of IPC based on Ext.P6 F.I.Statement allegedly given by the deceased himself. The injured died within a week after admission to the hospital. According to the prosecution, Ext.P6 F.I.statement can be taken as the dying declaration also. As per the above, at about 10' clock on 28.6.1998 accused inflicted an injury by a type of knife called Olakathi ( ). At about 10'clock after he taking tea from the shop of one Mathai, when he reached the road, the accused by knife inflicted one injury on him and bleeding started. When others came accused ran away with the knife. Again he stated that incident occurred on 28.6.1998 at about 10'clock. So at three places on the statement he has stated that at 10'clock the incident occurred. But according to the charge, incident took place at 2.15 p.m. on 28.6.1998. He did not state in the F.I.Statement that he was taken to the hospital immediately. The learned counsel for the appellant argues that the F.I.Statement cannot be accepted as the dying declaration as there is no evidence to show that the date he was able to give such a statement at that time. Further, the F.I.Statement was recorded only on 29.6.1998 at about 10'clock from the hospital at the Intensive Care Room (There is

also a correction in the time of recording). PWs.2 to 4 and PW8 who are close relatives including his two sons deposed that they came immediately after the incident and took the deceased to the hospital. According to PW1 close relative, he saw the incident. Any one of them could have given F.I.Statement to the police. PW1 did not also go to the hospital. According to the evidence, local people also gathered in the spot. The incident occurred only 5 kms away from the Chengannoor Police Station. However, Ext.P6 was recorded with much delay as it was only taken on the next day of the incident at 10' clock at Pushpagiri Hospital, Thiruvalla which is only 8 kms away from the Chengannoor Police station. Doctor was not present when F.I.Statement was recorded. There is no certificate issued by the doctor regarding his capability to give such a statement. F.I.R. was registered at 1.30 p.m. only. The police could have reached the police station within half an hour. There is no explanation for the delay in registering the F.I.R. F.I.Statement was recorded by PW12, Head Constable. According to PW12, delay in taking the F.I.Statement was that the deceased was in the intensive care unit and awaiting for doctors permission there was delay in taking the statement of

the deceased as he has to get the permission from the doctor. If that be so, why police did not get a certificate from the doctor regarding the capability of the patient in giving the statement is not explained. But according to the evidence of PWs.4 and 8, sons of the deceased they were there in the hospital and F.I.Statement could have been recorded from them on the date of incident itself. The Chengannoor Police station is adjacent to the Magistrate Court. There is no explanation why F.I.R. reached only in the evening of the next day, that is, 30.6.1998 at 4.20 p.m. The non-explanation of delay in recording the F.I.Statement, registering the F.I.R. and sending the same to the Magistrate, causes serious doubt over the genuineness of F.I.Statement and prosecution case. Delay in lodging the F.I.R. if unexplained is fatal as held by the Apex Court in ***Thulsi Kali v. State of Tamil Nadu (AIR 1973 SC 501)***. Apex Court in ***State of Rajasthan v. Taja Singh (2001 Crl.L.J. 1176)*** held that delay caused in despatching the F.I.R. to the Magistrate court due to holidays etc. are not sufficient explanation. It was held by the Apex Court in ***Balram Singh v. State of Punjab ((2003) 11 SCC 286)*** that delay in registering complaint by itself is not fatal but

evidence should be scrutinized by the court very carefully. Here no satisfactory explanation was given by the prosecution for the long delay. Hence we shall consider evidence in this case very careful as we can rule out possibility of manipulation and deliberations in making out a case.

2. The deceased was admitted in the Pushpagiri Hospital, Thiruvalla, on 28.6.1998. After 5 days of treatment in Pushpagiri Hospital he was taken to the Medical College Hospital, Kottayam and died on 10.7.1998. So he was under treatment for about 12 days. It is very difficult to understand why treatment records were not produced by the prosecution to understand the nature of treatment and why a proper dying declaration was not taken by the Magistrate. Even the reference card referring the patient from Pushpagiri Hospital to Medical College Hospital was not produced. Doctors who treated him at Pushpagiri Hospital and Medical College Hospital were not examined. The Doctor who was in charge of casualty of Pushpagiri Hospital was examined as PW5. He was not asked regarding the condition of the injured at the time of his examination. He also deposed that the injured was referred for

surgery and thereafter deceased was not treated by him. No evidence was adduced to show that he was able to talk at the intensive care unit or regarding mental or physical condition when Ext.P6 was recorded by the Head Constable. According to the counsel for the appellant, prosecution deliberately suppressed relevant materials to protect the real accused.

3. Before going to the other evidence we may also consider the defence version. Accused filed a written statement as part of the 313 statement. The defence of the accused was that deceased as well as his sons were engaged in illicit arrack business and all of them are accused in various cases. On 20.6.1998, deceased was arrested and was released on bail only on 27.6.1998 and sons of deceased PWs.4 and 8 several times threatened the accused on the assumption that the deceased was caught by the police on the basis of the information furnished by the accused. Therefore due to fear, he did not go to his house on 27.6.1998 and on the next day earlier by about 10'clock with the toddy collected he went to the toddy shop where he was working in a different route. By the time deceased, PWs.4 and 8 and Vasudevan father of PW1

came to the shop and assaulted him. Then the employees of the toddy shop intervened and there was altercation between them. He escaped from the shop and fearing his life, he went to the house of his wife and stayed there. He later understood that Kunjukunju got a stab injury and due to infection he died subsequently. Fearing that the toddy shop people will file case against deceased as well as his sons, deceased was not taken to the hospital in time. But he was taken to the hospital only when his condition became serious. Even though incident occurred at about 10 a.m. he was taken to the hospital only in the afternoon. It is also stated that after that, there was an understanding between toddy shop people and the sons of the deceased to settle the case. But somebody has to be made as an accused and appellant was made a scape goat. It is pointed out by the counsel for the accused that time of the incident mentioned in the statement of the accused tallies with the time mentioned by the deceased in Ext.P6 and the incident started at 10 a.m and not at 2.15 p.m. It is also submitted that motive alleged by the prosecution is also the same as mentioned in the 313 statement by the accused, that is, the deceased and his relatives suspected that he was put to in jail

in connection with the illicit arrack case because of the information furnished by the accused. It is also submitted by the counsel for the appellant that according to the prosecution due to that enmity accused assaulted the deceased but if the deceased suspected that accused was the informer to the police the motive is on the deceased to attack the accused and incident happened in a different place than what was alleged by the prosecution. It appears that defence version is more probable.

4. Before going to the oral evidence we shall consider the medical evidence in this case. PW5 is the doctor who issued Ext.P2 wound certificate. PW5 stated that he examined the patient at 2.50 p.m. and issued Ext.P2 certificate. Injuries noted in Ext.P2 are:

(1). Incised wound 3 cm long gaping on the left 10th intercostal space along the posterior axillary line.

(2). Incised wound 4 cm long to gaping over the 9th intercostal space along the left mid axillary line.

The alleged cause of injury is stated as follows:

It is pointed out by the prosecution that it is the earliest version given. According to him 2.15 p.m. is the time of incident. Doctor very clearly stated that injured was brought to the hospital by one Vasudevan and the above information was furnished by the said Vasudevan and not by the patient. Vasudevan is the father of PW1. According to the counsel for the appellant it gives rise to the presumption that deceased was unable to talk at the time when PW5 examined him and the wound must have become infectioned. The doctor also stated that since the matter was immediately referred to Surgeon, he is not aware of further treatment. He also stated that injury can be caused by a weapon like MO1. In re-examination even though it was stated that injuries were not old in cross examination it was deposed that injuries caused within past 4 to 5 hours will be considered as fresh injuries. So from the evidence of doctor, it cannot be stated that the injuries occurred only at 2.15 p.m. and only inference that can be made is that he was brought to the hospital at 2.15 p.m.

with serious injuries by Vasudevan father of PW1 and he was taken for urgent surgery. Vasudevan was not examined. He stated the history and cause of injury to the doctor. If Vasudevan was examined, the exact time of the incident would have been known. Deceased in Ext.P6 also did not say that he was immediately taken to the hospital and according to the deceased also time of the incident was 10 a.m. We also refer to Ext.P1 inquest report. It is true that inquest report can be referred only for the purpose of the nature of the state of body and statement given by the witness cannot be relied on as such and it is the same facts in 161 statement. But what is stated in the inquest report is that the incident occurred at 10 a.m. and that was stated by PW8 none other than the son of the accused and when he was cross examined he deposed as follows:

Ext.D3 material also shows that PW8 told police in his 161 statement that incident happened at about 10 a.m. and he was taken to the Pushpagiri Hospital at noon. He was not declared hostile by the prosecution and therefore his evidence is bound

on the prosecution and therefore the earliest version of the prosecution is contradictory to the present version of the prosecution regarding the time of the incident. Hence on the evidence of PW8, incident occurred at about 10 a.m. on 28.6.1998.

5. Police filed F.I.R. alleging offence under Section 324 of IPC was correct. It is also pointed out by the counsel for the appellant that according to the alleged eye witnesses who are close relatives of both accused and deceased and more close to the deceased there was profuse bleeding. Ext.P9 is the scene mahazar. In scene mahazar it is stated that at the alleged place of incident, nothing special was seen. So there was nothing to indicate that the incident occurred at the place of incident as pointed out by the prosecution. Their evidences regarding the place of incident makes defence story more probable.

6. Now we will come to the evidence of PW1 alleged eye witness who deposed in accordance with the prosecution story. According to PW1 deceased was his father's brother. Accused

was his father's sisters son. According to him, on 28.6.1998, he saw accused going out from his house holding knife behind his back.

At that time deceased was standing in front of a tea shop. Then accused called him . There is no evidence to show that accused used to call his uncle by name. When Kunjukunju asked why he was called, accused reported that he was searching for him and with the knife he inflicted two injuries and deceased cried. Then accused took away the knife and ran away and he identified the knife as MO1 and Kunjukunju was taken to the hospital by people and after one week he died. According to him, he went to a house for seeing T.V. and returned by 2.30 p.m because of failure of electricity. At that time, accused was standing at the place where the incident occurred. Later he stated that he came out of that house hearing the abusive words of the accused.

His earlier story that he saw accused going out from his house with the knife is not correct. He also stated that at the time of incident his father and mother were inside the house. He also stated that when he came out of his house hearing the exchange of abusive words between Kunjukunju and accused and saw the accused only when he reached the road.

He further deposed that there was exchange of abusive words between accused and deceased.

If that be so, his two earlier versions are not correct. His evidence is not invoking the confidence in the judicial mind. He is not trustworthy. He also stated that the house of the

deceased is also nearby to the tea shop. He deposed that PWs.4 and 8 the sons of the deceased were also there in that house at the time of incident. None of them looked outside when the incident happened. It is also stated that incident occurred very near to the shop of Mathai. He also further stated that on the first stab itself, blood was oozing out. The dress was also blood stained. Kunjukunju fell down. He was taken in the autorickshaw within minutes to the hospital. According to him, wife of Kunjukunju and daughter of Kunjukunju (both of them not examined) came and no neighbours came there. So, it is very positive that only wife of Kunjukunju and daughter came to the place before he was taken in the autorickshaw. He also stated that shop owner Mathai and his wife did not come near the place and only after injured was taken in the autorickshaw to the hospital they came and nobody else were there in the tea shop for taking tea. He denied the suggestion that he was telling lies at the instance of PWs.4 and 8. He also further stated that PW8 is conducting the toddy shop and he is not an employee of PW8. He did not accompany the accused to the hospital. He did not interfere in the dispute even though his own close relative was

injured serious. He did not report to the police also.

7. PW2 is only a witness to the inquest. Now we will come to the evidence of PW3. She stated that the deceased was her grand father. When she heard the cry of PW1, she went outside and saw accused with blood stained knife and also deceased was found standing with bleeding injuries. In cross examination she stated that she heard the cry while she was talking with her friend on the back side of the house. She rushed to the place of incident but her friend did not come. Later when the friend came, she as well as PW1 and neighbours, Mathai, his wife etc. were there. That is against the deposition of PW1. According to PW1, since he did not cry loud, none of the neighbours came there except the wife and daughter of the deceased. She repeated that by the time she came hearing the cry, apart from PW1, people of the locality, shop owner Mathai and wife etc. was there when she reached the place of occurrence. Her mother and wife of Kunjukunju were also there. Her Father (PW4) was also there and they were surrounding the deceased Kunjukunju. She also stated that she came with PW1 and his father together came to the

Court. If evidence of PW3 is believed, PW1 cannot be believed as PW1's case is entirely different. According to PW1 only wife and daughter of the deceased alone are there. PW3 is none other than PW4's daughter. PW4 is the son of the deceased. It is also pertinent to note that even though PW3 stated that in cross examination that no incident occurred at 10 a.m., she never deposed the time of the incident.

8. PW4, who is the son of the accused is another occurrence witness examined by the prosecution. He also deposed that hearing the commotion when came to the place of incident, he saw accused running with knife and his father lying with stab injuries. But he did not inform to the police. Then Public Prosecutor asked a specific question to PW4 whether his father said anything. First he said that he stated nothing ( ). Thereafter he said 'stabbed' ( ). Public Prosecutor asked who inflicted injury. Then he answered ( ) that Raju has stabbed and according to him there were three stab injuries. Then he added that it is not three but four stab injuries. But as per the post mortem certificate and as well as the wound

certificate there were only two injuries. He also stated that he was taken to the Pushpagiri Hospital and thereafter to Medical College Hospital and then father died. He also stated that he cannot identify the knife. It is to be noted that time of the incident was not stated by PW4. PW4 did not tell that immediately after the incident he was taken to the hospital. Time when deceased was taken to the hospital was also not stated by him. He stated that his brother PW8 is an accused in some cases but he is not an accused and against the father there was only one excise case. He also stated that on a false complaint made by the accused, his father was arrested and his father was in jail for five days. But he has no enmity towards the accused even though their father was trapped in a false case by him and on the next day when father was returned on bail, the incident occurred. He also stated that some people were running ahead of him and they saw that his father was stabbed, that is, about 10 to 15 persons. So independent witnesses reached the place of incident before him. By the time he reached there 10 or 15 persons and Mathai and his wife were there and he reached the place after two or three minutes after the incident. He also stated that

mother and neighbours were there at the place of occurrence. This is as against the deposition of PW1, the alleged eye witness. When he arrived his father was lying and he was taken to the auto. According to Ext.D2 portion in his 161 statement he, his wife and child took the injured to the house and deceased was seated in a chair. Till that time deceased was lying there. In his own 161 statement which was marked as Ext.D2(a) deceased was taken to hospital by Vasudevan (father of PW1) and one Mathai. According to deposition, he, his wife, PW3 and his mother took the deceased to the hospital.

But according to the doctor it is Vasudevan who accompanied the deceased in the hospital and not PW4 or his wife or PW3 or his mother. He also stated that police came to the house on the third day for taking the statement. He deposed that he nor father scolded accused for reporting false case. But Ext.D3(b) from the 161 statement shows that he stated to the police that there was exchange of words on the allegation that the deceased has trapped the deceased in a false case. He also deposed that father stated that 'Raju stabbed' was heard by all

the people assembled there including Mathai and his wife and he also saw accused running away. He saw the back of the accused. He denied the suggestion that at 10' clock in the morning some incident happened at some other place and for avoiding the police case matter was not reported to the police but when the condition of the father became serious and he was taken to the hospital.

9. The only other evidence relied on by the prosecution is the evidence of PW8 who is the other son of the deceased. He deposed that he was also there when deceased was taken to the Pushpagiri Hospital. He is also present at the time of inquest. According to him in the hospital, he was told by his father that accused stabbed when he was lying in Pushpagiri Hospital. He has no case that when he reached the house father told like that. He was able to speak and he was conscious at the hospital. He also stated that he is not remembering the time when he reached the hospital. He, Vasudevan and Mathai were in the autorickshaw in which deceased was taken to the hospital. So according to him, it is Vasudevan and Mathai and himself took the deceased to the

hospital. This is totally against the version of PW4. He also stated that he is not remembering whether to the police he has stated that when he was sitting in shop at Neerettupurathu, the incident occurred. He stated that incident occurred at 10' clock. He stated that father of PW1 is Vasudevan. He also stated that he came to the place of occurrence after 10' clock. When he was asked that whether he was an accused in 4 to 5 cases he replied that he is the accused in three cases and he has not seen the incident. By noon only he knew about the incident and he came there and incident which have occurred much earlier and only after his arrival deceased was taken to the hospital along with Vasudevan.

10. The only other evidence is the post mortem certificate wherein the doctor noticed the following ante-mortem injuries:

Injuries (Ante-mortem):

1. Sutured incised healing wound 2.5 x 0.5 cm. obliquely placed on the left side of the back of chest, its upper inner end was 25 cm. below the top of

shoulder and 10 cm. outer to the midline. The left chest wall was penetrated through the 9th intercostal space and by cutting the 10th rib. Left side of the diaphragm showed a sutured cut for a length of 3 cm. and the transverse colon showed a sutured wound 1 cm. long. Coils of intestine were adherent lusterless and covered with flakes of yellowish pus abdominal cavity contained 380 ml. of yellowish foul smelling fluid. The general direction of the wound was forwards and downwards for a total minimum depth of 8 cm.

2. Incised healing wound 3 x 0.5 cm. obliquely placed on the left side of the back of chest. Its upper inner end was 14 cm. below the posterior fold of armpit. The 8th intercostal space was seen penetrated and the wound terminated in the left chest cavity.

3. Infected wound 1.5 x 0.5 cm. on the outer aspect of the left side of the chest 5 cm. outer to the nipple (Surgical).

4. Surgical suture wound 20 cm. long, vertically placed on the front of middle of abdomen; its lower end was 6 cm. above the pubic synophisis, with a sutured drainage wound 2 cm. on the left flank with a corrugator rubber tube in sutu.

5. Surgical cotostromy wound 5.4 cm. obliquely placed on the right side of the front of abdomen. Its upper inner end was 9 cm. outer to the midline and 25 cm. below collar bone.

PW11 conducted the post mortem. The opinion as to the cause of death was due to peritonitis following the penetrating injury sustained. Injury No.1 is sufficient to cause death in the

ordinary course of nature and Injury No.1 is a stab injury. Injury Nos.1 and 2 can be caused by a weapon like MO1. To the question in cross examination that Injury No.2 is not a stab injury he answered as it may cause by stabbing also. But it is penetrating wound. Peritonitis is a circumstance intervening after the injury before death. He further stated that person was subjected to surgery before his death. He also stated that in case of internal injury immediate surgery is conducted and he is not aware when surgery was conducted. It is also stated that if the blood is allowed to be remained in the cavity, peritonitis may happen. If the surgery is careless also it may happen.

11. In this case police relied of the dying declaration given to the police in Ext.P6 F.I.Statement and also dying declaration heard by Pws.3, 4 and 8. According to the prosecution, statement made by the three witnesses who have heard the dying declaration is that it is the accused who inflicted injuries on the deceased. We have already seen that the Ext.P6 can be relied on as condition of the patient at the time it was recorded was not proved and it is vitiated by many factors. The dying declaration is undoubtedly admissible under

Section 32 of the Evidence Act but not being a statement on oath so that its truth could not be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to take the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Dying declaration recorded by police officer also can be relied on if court is convinced that such statement was given by the deceased at that time when he was in a fit state of mind without tutoring from anybody. If the statement found corroboration from other witnesses (***See Ramawati Devi v. State of Bihar (AIR 1983 SC 164***). It was as follows:

> "It is not the plurality of the dying declarations that adds weight to the prosecution case, but their qualitative worth is what matters. It has been repeatedly pointed out that the dying declaration should be of such nature as to inspire full confidence of the Court in its truthfulness and correctness" (vide the observations of Five Judge Bench in ***Laxman v. State of Maharashtra ((2002) 6 SCC 710)***. In as much as the correctness of dying declaration cannot be tested by cross-examinatioin of its maker, "great caution must be exercised in considering the weight to be given to this species of evidence". When there is more than one dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities. ***(State of Maharashtra v. Sanjay (2004 (8) Supreme 138)***

In this case, we have already considered the evidence and found that dying declarations as deposed by the witness are not believable. Evidence of PW1 is opposed by PWs.3, 4 and 8. Evidence of PW4 is opposed by PW8. PW3's evidence is also opposite to the evidence of PW1. According to PWs.3 and 8 they were not in the house at 10' clock but PW1 stated that PWs.4 and 8 were in the house. Prosecution evidence contains full of contradictions. The evidence of PWs.3, 4 and 8 would show that they all came on the place of incident after the occurrence hearing the cry of PW1 and when they came large

number of people arrived. But according to PW1 nobody other than himself and wife of the deceased arrived at the place of incident. Only much later the neighbours gathered. All witnesses other than PW1 stated that Mathai and wife were present. It is in front of his shop that the incident occurred when deceased was returning from the shop immediately after consuming tea. Why Mathai or wife was not examined is not explained by the prosecution. No independent witnesses were examined even though their presence are admitted. Even according to the prosecution although large number of local people arrive, none of them were examined. When independent witnesses were available and related witnesses examined were inimical to the accused, independent persons ought to have been examined. At last Mathai or other neighbours should have been examined on the facts of this case. In fact the police have questioned Mathai and other local people also. The time of incident, nature of incident whether incident occurred in the front of the tea shop etc. could have been explained by independent witness like Mathai and others. Instead all witnesses were examined were close relatives and their evidence can be accepted only after close scrutiny. The

only evidence in tune of prosecution case is PW1. His evidence is contradictory to other prosecution witnesses.

In this case, taking the entire evidence adduced in this case, we are of the opinion that prosecution failed to prove the offence alleged against the accused conclusively. In any event, accused is entitled to the benefit of reasonable doubt and hence we acquit the accused. We set aside the conviction and sentence passed on the accused and he should be set free forthwith if he is not required in any other case.

Appeal is accordingly allowed.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.880 OF 2004 ()

J U D G M E N T

5th October, 2007